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Supreme Court, U.S.
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No. — 03 747 NOV 17 2003

In The

Supreme Court of the United States

KENNETH A. FINDLAY, et al.,
AGENCY CASE NOS. 75-348-802, 75-348-803,
75-348-804, 75-348-805,

Petitioner,

vs.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH A. FINDLAY, Pro Se
1911 N. 31 Avenue
Hollywood, FL 33021
954-983-8443

97 pp

QUESTIONS PRESENTED

1. Whether the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's claim for a finding of an Admission against Interest by the INS for failing to file a Reply Brief properly and then failing to remedy such an error is contrary to the fundamental rights of Petitioner as secured by the Fifth Amendment and Fourteenth Amendment Due Process clauses of the U.S. Constitution and the Fourteenth Amendment Equal Protection Clause, notwithstanding regulations such as 8 C.F.R. Section 3.38(f) or the Federal Rules of Appellate Procedure, or in the alternative, by failing to file a Reply Brief the INS admitted the Petitioner's factual allegations as true and waived its right to file a Reply Brief before the U.S. Court of Appeals for the Eleventh Circuit.

2. Whether the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's claim for Relief pursuant to INA Section 208(a) re Asylum was against the Substantial Weight of the Evidence and contrary to law in that Petitioner in fact met his statutory and discretionary burdens of proof pursuant to the above and the requirements of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), said Decision being in conflict with *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) re a misapplication of the law as to a "reasonable basis" for his and his family's well-founded fear of future persecution on account of race if forced to return to South Africa.

3. Whether the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's Claim for Relief pursuant to INA Section 208(a) re Asylum was

QUESTIONS PRESENTED – Continued

against the Substantial Weight of the Evidence and contrary to law in that Petitioner in fact met his statutory and discretionary burdens of proof pursuant to the above and the requirements of 8 C.F.R. Sections 208.13(b)(2)(i) and 208.16(b)(3) as well as being in conflict with *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995) re a Pattern and Practice of Persecution on account of race by the Black Majority against Similarly Situated Whites in South Africa.

4. Whether, in the alternative, the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's claim for Relief pursuant to INA Section 241(b)(3) re Withholding of Removal, was against the Substantial Weight of the Evidence and contrary to law in that Petitioner met his statutory burden of proof and the requirements of *INS v. STEVIC*, 467 U.S. 470 (1984), as well as for the reasons stated in answer to Issues No. 1 and No. 2 above, incorporated by reference, establishing that it is more likely than not that Petitioner and his family will be persecuted on account of their race if forced to return to South Africa.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided my case was August 19, 2003.

This Court's jurisdiction is conferred by 28 U.S.C. Section 1254(1), 28 U.S.C. Section 2350 and INA Section 242, 8 U.S.C. Section 1252 and jurisdiction below at the BIA was conferred by 8 C.F.R. Section 3.1(b) re the Appeal from the Decision of the Immigration Judge Denying Appellant's application for Relief from Removal/ Deportation pursuant to INA Section 237(a)(1)(c)(i), 8 U.S.C. Section 1227, et seq. – in United States in violation of law, remaining longer than permitted. Appellant filing for Asylum under INA Section 208(a) and Withholding of Removal under INA Section 241(b)(3), 8 U.S.C. Sections 1158 and 1251(b)(3), respectively.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the U.S. Constitution, Due Process Clause.

Fourteenth Amendment to the U.S. Constitution, Due Process and Equal Rights Protection Clauses.

INA Section 208(a).

INA Section 241(b)(3).

STATEMENT OF THE CASE

Respondents, Kenneth A. Findlay, principal applicant; his wife, Marilyn V. Findlay, and their two (2) minor sons, Robert J. Findlay and Richard A. Findlay, in the present case are natives and citizens of South Africa. On July 9, 1991, the lead Respondent/Petitioner (hereinafter Petitioner) was admitted into the United States at Atlanta, Georgia, as a nonimmigrant business visitor, with authorization to remain in the United States until January 8, 1992. The other Respondents/Petitioners, Petitioner's wife and two sons, arrived in the United States at New York, New York on November 30, 1991, as nonimmigrant visitors, also with authorization to remain in the United States until January 8, 1992. The Findlays subsequently overstayed their visas. Petitioner, on behalf of himself and his family, filed an affirmative application for asylum, consolidating all of the family members' claims together, with the Immigration and Naturalization Service (Service) on May 5, 1997. On July 31, 1997, the Service initiated removal proceedings against Petitioners by issuance of a Notice to Appear (NTA), alleging the above mentioned facts and charging Petitioners with removability pursuant to Section 237 (a)(1)(B) of the Immigration and Nationality Act (Act). On August 13, 1997, Petitioner's Form I-589 Application was filed with the Miami Immigration Court.

At a master calendar hearing on August 19, 1997, Findlay, et al., through counsel, conceded proper service of the NTA, admitted the factual allegations contained therein, and conceded removability as charged. South Africa was designated as Petitioner's country of removal. The I.J. found that removability was established by clear and convincing evidence. *See* INA Section 240(c)(3); *see also* 8 C.F.R. 240.8(a). At the August hearing, Petitioner requested

an opportunity to supplement his initial application for Asylum and Withholding of Removal. And on January 15, 1998, the I.J. conducted a merits hearing to determine whether Petitioners merited the forms of relief that they requested. The I.J. issued a Written Decision on 12-11-2000 Denying Petitioner's request for relief pursuant to Asylum under INA Section 208(a) as well as Petitioner's request for relief pursuant to Withholding of Removal under INA Section 241(b)(3). The Petitioner timely filed a Notice of Appeal to the BIA Appealing the Decision of the Immigration Judge (hereinafter I.J.) on 01-09-2001. The BIA issued a two-line Decision with no opinion upholding the Decision of the I.J. on 10-24-2002. Petitioner then timely filed a Petition for Review on 11-19-2002 with the U.S. Court of Appeals for the Eleventh Circuit. The U.S. Court of Appeals for the Eleventh Circuit issued a written Decision of seven (7) pages on August 19, 2003 affirming the Decision of the Board of Immigration Appeals (hereinafter BIA) upholding the Decision of the Immigration Judge below, finding that Kenneth Findlay and his wife, Marilyn Findlay, who also testified, failed to meet their statutory burden of proof under INA Section 208(a) re Asylum by failing to establish and prove that Petitioner's well-founded fear of future persecution on account of race in South Africa was "reasonable" in light of the substantial evidence in the record and that the alleged racial persecution was insufficient to establish persecution. Further, the U.S. Court of Appeals for the Eleventh Circuit found that Petitioner failed to meet his burden of proof under 8 C.F.R. Section 208.13(b)(2)(iii)(A), INA Section 208(a), and *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995) re a well founded fear of future persecution based on a pattern and practice of persecution on account of race in South Africa against the minority Whites by the vast majority of

Blacks. The U.S. Court of Appeals further found that Petitioner's arguments that because the INS did not file a brief before the BIA, the BIA must accept Petitioner's factual allegations as true, or in the alternative, the INS (now BCIS) waived its right to file a reply brief before the U.S. Court of Appeals for the Eleventh Circuit, finding that mere Agency Rules at 8 C.F.R. Section 3.38(f) allow that briefs may be filed and are optional and that neither the Agency Rules nor the Rules of Appellate Procedure prohibit a party from filing a brief in federal court if a brief was not filed in the administrative proceedings relying upon Fed. R. App. P. 28(c).

STATEMENT OF THE FACTS

(a) Petitioner's Testimony

Petitioner was born on June 27, 1948 in Johannesburg, South Africa. Petitioner last arrived in the United States on July 9, 1991. C.A.R. 178. Prior to that arrival, Petitioner visited the United States in 1977 for vacation and on numerous other occasions for the purpose of conducting business, virtually once a year to the U.S. and Europe. C.A.R. 178. Findlay was a gunsmith in South Africa and often worked on creating new gun designs. C.A.R. 214. In 1989 Findlay closed his South African gun business, because the South African economy was doing poorly and the African National Congress (ANC) announced in a published "manifest" that they intended to ban the distribution and ownership of firearms by South African residents once they came to power. C.A.R. 214.

Throughout the 1970s and 1980s, Findlay lived in South Africa. In his testimony, Findlay described a

situation in which South Africa gradually deteriorated into a nation of instability and violence over the course of those decades. According to Petitioner, the once highly motivated and highly organized police force and military fell into disarray as both became torn apart by racial strife. C.A.R. 219. Petitioner explained that, over time, Blacks became more aggressive and militant and that the ANC began using whatever means it could to destabilize South Africa, including bringing young children into the fight for liberation, noting that one of the strategies for guerilla war is to make a country ungovernable. C.A.R. 219.

When asked about what made him personally afraid, Findlay indicated three different occurrences that led him to believe that he and his family were in danger: (1) a mugging in 1990; (2) uncontrolled rioting in a town neighboring his hometown; and (3) threats to his children's lives. With regard to the mugging, about two (2) weeks after returning from America on a business trip and about nine months before Petitioner left for the United States, Findlay was attacked by five black men while walking in broad daylight in downtown Johannesburg at about 1:00 p.m. C.A.R. 203-208. Findlay was walking to his place of business (a gun boutique) when one of the men pulled out a knife and struck him in the chest. At the time, Petitioner was carrying a gun in his briefcase and struggled to retrieve the gun as the muggers beat and kicked him. The muggers succeeded in stealing Findlay's wallet and watch, but he was ultimately able to retrieve his gun. C.A.R. 203-208. Apparently, the sight of the gun frightened Findlay's muggers, and they scattered into a nearby crowd. None of the five men said anything to Findlay while they mugged him, nor did any of the large group of black people in the crowd offer to help Findlay. Petitioner stated that all the

black people in the crowd on the street did "nothing" and that everybody figured that, oh, it's the white guy getting his just desserts. C.A.R. 205-206. It wasn't until a white guy looking out of the building across the street came to help that Findlay received any kind of aid. C.A.R. 206. According to Findlay, he saw no point in filing a police report, because he did not think the police would do anything about the incident. Petitioner testified that he realized in 1990 that South Africa was heading toward a changeover to the elimination of apartheid, C.A.R. 208, and that he and his family left while apartheid was still in effect and before the election. C.A.R. 210.

Of further concern to Petitioner was an incident one evening that involved rioting by black South Africans in a nearby township. On that evening, a police officer came to his house and stated that there was uncontrollable rioting down the road. C.A.R. 211. The police officer consequently told Findlay and his family to arm themselves, to make sure his family remained inside the house and to shoot any of the rioters should they enter onto his property. Findlay realized that the police were unable to control the riots, and therefore, he and his family would have to take (the law) into their own hands. C.A.R. 211. Findlay told of how the cold rain that night stopped the Blacks from rioting and fighting. C.A.R. 211. Further, that when traveling to and from Johannesburg he and his family were virtually stopped once a week by the S.A. policemen at a roadblock. And that Blacks had their own roadblocks in the outlying Townships, often to stop the other major Black Tribe members, the Zulus, from entering Xhosa tribal areas. C.A.R. 211-212. Findlay told of how the Black Xhosas had turned over a car and set the car on fire. Two (2) white witnesses came driving along and made the

mistake of stopping and trying to assist. One (1) of the two (2) was killed and the other ran away into the nearby woods. C.A.R. 212.

As to the threats to Petitioner's children, Findlay explained that this marked the final factor in convincing him that his family needed to leave South Africa. C.A.R. 217-218 and C.A.R. 242-243. While still living in South Africa, Findlay employed several black people in his home, including a woman who worked as his family's maid. About six months prior to Petitioner's departure from South Africa, the maid told Petitioner that the ANC told her that, as soon as the ANC rose to power, her job was to kill his children. Although Findlay did not believe the maid herself was capable of such acts of violence, the mere threat of the ANC killing his children was enough to make him want to leave South Africa. Findlay also testified about his neighbor, Henry, who was always harassed, robbed and taunted by Blacks from the neighboring township and how Henry was shot by one of them shortly after he and his family arrived in America, confirming their choice to leave South Africa as a good one. C.A.R. 213-214. Findlay said that he had a shooting gallery on his property and often had that operational and the Blacks in the Township feared guns and knew he had a lot of them so they left him and his family alone. C.A.R. 213. He carried a gun at all times.

As a result of these events, Findlay and his family finally decided to leave South Africa permanently in 1991. Petitioner claimed a well-founded fear of future persecution on account of race. Findlay believes there is a pattern and practice of persecution on account of race in South Africa against similarly situated Whites. Findlay noted how the Blacks had easy access to illegal AK-47's. C.A.R.

218. Findlay said that his mother and sister still reside in South Africa, and neither have suffered any physical harm at the hands of black South Africans, but noted he kept in contact with his family back in South Africa by phone and that things got worse and worse. C.A.R. 224 and 231. Findlay noted that he and his family got out of South Africa ahead of the elections and he figured there was going to be a civil war in South Africa. C.A.R. 220.

As he described it, Petitioner has at no time since his departure in 1991 felt safe to return to South Africa. For a long time, he awaited positive changes in the political, social and economic conditions of South Africa, stating that he would have returned had conditions shown at least some signs of improvement. Those changes did not come. Rather, the situation has only worsened, according to Petitioner. C.A.R. 224. He believes that returning his family to South Africa would mean subjecting them to serious danger, as he does not think any white person can be safe in South Africa. He attests that significant numbers of black people are persecuting white people, and does not want his family to become a "victim of the post-apartheid backlash." C.A.R. 229-230. Findlay noted that all the whites in South Africa have had to turn their home into a fortress with burglar bars on the windows, double security gates and burglar alarms. C.A.R. 234. Further Findlay told of how the White and Black soldiers were torn apart along racial lines, C.A.R. 225, how black soldiers attacked their White sergeant, C.A.R. 227, and how the Police have the same problem. C.A.R. 226. Findlay believed that the tactics of the Blacks targeting children's school buses and even his own children, C.A.R. 242-243, was part of a policy that had as its goal driving the last White person into the sea. C.A.R. 243.

(b) Wife's Testimony

Petitioner's wife, Marilyn Findlay, testified to the following facts at the hearing conducted on January 15, 1998:

Mrs. Findlay was born on November 14, 1955 in South Africa. During high school, she and her husband met, and they now have two minor children together. Mrs. Findlay feels that the rising level of violence is not a result of simple crime as the Service contends, but that the majority of the violence stems from widespread racial hatred, noting the murder of White American Amy Biehl in 1994 by Blacks as one example of such hatred. C.A.R. 264. Ms. Biehl's Black friend, Macebe, testified at the trial of her killers, after many witnesses had been threatened with death if they testified against fellow Blacks, that "all the mob saw was that she was White." Petitioner's wife testified what when Amy Biehl's family came from California to South Africa for the trial they were greeted at the Courthouse by Black mobs with jeers and chants of "One American, One Bullet," a variation of Peter Mokaba's "One Settler, One Bullet." C.A.R. 264 and C.A.R. 258.

When asked to explain the root of her fear, Mrs. Findlay referred to widespread animosity toward Whites throughout South Africa, C.A.R. 258, and claimed that the police were incapable of stemming this animosity as there are significant racial divisions amongst the police officers themselves, C.A.R. 259, noting how the Police have racial divisions amongst them with Blacks and Whites hating and fighting each other. C.A.R. 259. The Police also have a very high incidence of suicide, both involving themselves and their families. C.A.R. 851-854. The Police have even demonstrated in the streets of Johannesburg because they

don't feel safe themselves, along with the Bank Tellers and White Farmers! C.A.R. 259. Mrs. Findlay also noted several reports from the Internet which indicated to her that the situation in South Africa was only worsening: stories of fights between black and white students, C.A.R. 261; accounts of a brutal attack by black men against a White elderly couple, and reports of the rape of a White man by several black men. Also, Mrs. Findlay told of how a White German tourist was killed by Blacks on New Year's Eve and when a woman nearby wanted to go for help she was told by the Black passers-by that he deserved to die because he was White. C.A.R. 264. And of a White man from Ft. Lauderdale, Florida, a tourist, who was also killed in South Africa on account of race.

In addition to the increasingly widespread racial violence, Mrs. Findlay noted that the political situation for White South Africans is deteriorating as well. She pointed to several government officials, namely, Deputy Minister Peter Mokaba and Minister of Justice Dullah Omar, as people now in power who openly reveal their animosity towards Whites. C.A.R. 258. It was Peter Mokaba who coined the slogan: "One Settler, One Bullet." The ANC-led government headed by Nelson Mandela then appointed Mokaba as Deputy Minister. Also, Petitioner's wife noted the impact of affirmative action policies in South Africa on the ability of white people to obtain jobs. She stated that Whites are routinely kicked out of their jobs to make room for Black South Africans, despite the fact that she believes the Black Majority should not need affirmative action.

Mrs. Findlay noted how Black and White students fight constantly, C.A.R. 262, and how White teachers have been fired because of ANC government policies to replace White teachers with Black teachers, even though the

Black teachers are ill-trained or not trained at all. C.A.R. 261-262.

Petitioner's wife is still convinced that she and her family would ultimately become targets of racial violence if they were forced to return to South Africa. To bolster this assertion, Mrs. Findlay noted the fact that there are nearly thirty million Blacks in South Africa as compared to only four to five million Whites. C.A.R. 270. Mrs. Findlay believes it is simply inevitable that the Black people, having been denied so much for such a long time, will seek revenge against White people. C.A.R. 263. She also feels that "White faces are an easy target for hate," and as such, White people cannot be safe in South Africa, C.A.R. 271, and, further, that most of the crime is due to "racial hatred." C.A.R. 273. The motive for the racial hatred was the history of Apartheid and oppression of Blacks in South Africa, she said. C.A.R. 272. Though not a political activist Mrs. Findlay noted that the ANC-led government of South Africa broke promises to the White National Party after the 1994 election, canceling the Interim Constitution and establishing a Permanent Constitution that effectively excludes the National Party from any power-sharing role in government. C.A.R. 268 and C.A.R. 337-338, noting many laws or rules may be on paper but they are not practiced by the ANC-led government. C.A.R. 275.

Objective Documentary Evidence of a Well-Founded Fear of Future Persecution on Account of Race

The Petitioner and his wife have testified referring in many instances to events that have occurred in South Africa both before they departed and since they have been

here in America. The Objective Documentary Evidence is voluminous and the Substantial Weight of the evidence not only corroborates the credible testimony of Petitioner and his wife per the I.J. finding but further establishes the reasonableness of their Well-Founded Fear of Future Persecution On Account of Race as well as a Pattern and Practice of Persecution on Account of Race by the Black majority population in South Africa and the ANC-led government Against Similarly Situated Whites. The Substantial Weight of the Evidence shows that the BIA Decision upholding the Decision of the I.J. is erroneous and should be Reversed and a Grant of Asylum is due Petitioner and his family since they have met their statutory and discretionary burdens of proof pursuant to INA Section 208(a) or, in the alternative, that it is more likely than not that the Petitioner and his family would be persecuted on account of race if they are forced to return to South Africa since the Substantial Weight of the evidence establishes that Petitioner and his family have met their statutory burden of proof pursuant to INA Section 241 (b)(3). An excellent summary of the Objective Document evidence is to be found in Petitioner's BIA Appellant Brief, C.A.R. 010-026, especially at pages 016 and 020-023. Further, please review Exhibit 5, as referenced in the I.J.'s Decision, C.A.R. 079, Exhibit 5 being Petitioner's Motion to Supplement I-589 Application For Political Asylum Based on Race and Withholding of Deportation, C.A.R. 357-380.

REASONS FOR GRANTING THE PETITION

Issue No. 1

Whether the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's claim for a finding of an Admission against Interest by the INS for failing to file a Reply Brief properly and then failing to remedy such an error is contrary to the fundamental rights of Petitioner as secured by the Fifth Amendment and Fourteenth Amendment Due Process clauses of the U.S. Constitution and the Fourteenth Amendment Equal Protection Clause, notwithstanding regulations such as 8 C.F.R. Section 3.38(f) or the Federal Rules of Appellate Procedure.

As noted above the Service has failed to oppose the Appellate Brief, testimony and objective documentary evidence of Petitioner before the BIA, thus admitting the truth of Petitioner's allegations and request for relief as established by the Order of the BIA in their Order dated 08-29-2001, "Rejection of Brief", C.A.R. 006-007, in the above styled matter where the BIA noted the "INS's brief, which was received at the Board of Immigration Appeals on August 27, 2001 does not include a signature on the proof of service. Accordingly, it is returned to the sender herewith." Upon this attorney's review of the Certified Administrative Record no Motion for Consideration of a Late-filed Brief was found in the C.A.R. nor was any properly filed Brief by the INS. Consequently, Petitioner moves this Court to Reverse the Decision of the BIA upholding the Decision of the I.J. as the BIA and this Court must accept the evidence of Petitioner in the light most favorable to Petitioner since no opposition was made to Petitioner's evidence and legal arguments and Grant Asylum to Petitioner and his family. Consequently, the Decision of the BIA below upholding the Decision of the

I.J. is clearly against the Substantial Weight of the evidence as the only evidence properly before the BIA was Petitioner's.

In the alternative, the Court herein must Reverse the Decision of the I.J. if this Court finds Petitioner has established a prima facie case for relief pursuant to INA Section 208(a) since the INS (now BCIS) admitted all of Petitioner's evidence and legal arguments before the BIA by not opposing any of Petitioner's case before the BIA. Petitioner asserts that the Service has permanently waived all rights and opposition to Petitioner's evidence and legal arguments by not properly filing a Response Brief to Petitioner's Brief before the BIA as required by BIA rules, regulations and the law.

Consequently, the Decision of the BIA below upholding the Decision of the I.J. is clearly against the Substantial Weight of the evidence as the only evidence properly before the BIA was Petitioner's.

The BIA has appellate jurisdiction under 8 C.F.R. Section 3.1(b) and also has *uniform* rules of Appellate procedure for removal cases. *See* 8 C.F.R. Sections 240.15, 240.53(a) and 8 C.F.R. Section 3.3. Among the uniform rules are quid pro quo rights and duties of the adversary parties such as: (a) the INS as well as the respondent has the right to appeal and the appeal *must* be filed within 30 days of service on form EOIR-26. *See* 8 C.F.R. Sections 3.3(a)(1), 3.38(c), 240.15 and 240.53(a); (b) the Notice of Appeal must specify *in detail* the grounds of appeal, *see* 8 C.F.R. Section 3.3(b); and (c) Reply Briefs are also due within 30 days of receipt of opposing briefs. In the instant case the INS did in fact file a Reply Brief but failed to properly sign and execute the Certificate of Service,

resulting in the Order of the BIA denying the INS Reply Brief, rejecting it. In *Huicochea-Gomez v. INS*, 237 F.3d 696, 700-01 (6th Cir. 2001) the Court there ruled that the failure of the BIA to grant an Extension of time to file a brief before the Board did not violate due process. And, again, the 5th Circuit in *Anwar v. INS*, 116 F.3d 140, 144 (5th Cir. 1997) upheld the BIA's Denial of acceptance of a Brief not served on the Opposing Party and therefore out-of-time, pursuant to 8 C.F.R. Section 3.3(c).

The above rules apply to both parties. And in a related section of the regulations governing Motion Practice, *see* 8 C.F.R. Section 3.2(g)(3), (h), a Motion is deemed UNOPPOSED unless a timely response is made. And *see Matter of Kasinga*, 21 I&N Dec. 357, 363 (BIA 1996) and *Matter of Guevara*, 20 I&N Dec. 238, 249 (BIA 1991) where the Board ruled that the INS may *NOT* get a remand where it previously had an opportunity to try an issue and wants a second chance.

The Decision by the Eleventh Circuit Court of Appeals at page seven (7), footnote 4, in response to Issue No. 1 in Petitioner's Opening Brief at pages viii and ix and 19-21, cites no rationale or authoritative basis for excusing the INS failure to properly and timely file their Reply Brief and failure to even try to correct same. The Eleventh Circuit merely states that "Although agency rules permit both parties to file briefs before the BIA, nothing in the rules requires them to do so. *See* 8 C.F.R. Section 3.38(f) (providing that "[b]riefs *may* be filed by both parties" (emphasis added)). The Eleventh Circuit ignores the uniform nature of the rules, the adversarial nature of the proceedings with a quid pro quo, and the requirements of fundamental fairness, due process and equal protection.

The fact is that the INS *did* file a brief and did so improperly. That should be enough to have an *unopposed* Petitioner brief! The Eleventh Circuit interpretation would give NO MEANING to the Regulations or sanctions available to the Board to enforce the regulations against both parties to the proceedings. The above cases demonstrate that the regulations and sanctions apply to the INS as well as to Respondents! *See Da Cruz v. INS*, 4 F.3d 721 (9th Cir. 1993) where the Court there found that the *INS failure to file notice timely nullified the BIA decision*; and *see also Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995) *where the Board enforced the above regulations* by *DISMISSING THE INS APPEAL* filed one day late following the Decision in *Da Cruz,* supra.

The Eleventh Circuit analysis merely notes how the rules in the regulations do not *require* both parties to file briefs, but states nothing about the *meaning* of the regulations, their purpose, the rights of the parties secured thereby nor the consequences for failure to file a brief. A party is also not required to oppose another party's brief or even file an appeal – but that does not mean there are not rational consequences for a failure to do so. The same analysis regarding the rules of Appellate Procedure is cited by the Eleventh Circuit that merely states that a party is not prohibited from filing a brief in federal court if a brief was not filed in the administrative proceedings. This analysis is devoid of meaning, begging the question of why a Briefing Deadline was set by the BIA for the INS in the first place, why the regulations exists; why the BIA Decision Rejected the INS Brief and cited a possible remedy for the INS provided by the regulations in filing a Motion To File a Late Brief. Nobody is going to sanction them, put them in jail or deport them. Petitioner argues

that justice, due process and fundamental fairness require the same consequence for the INS as would have befallen Respondent had he not timely and properly filed his Brief – at least to the extent of an Unopposed Brief by Petitioner since the INS *in fact* attempted to oppose Petitioner's Brief at the BIA, the consequence being an admission of the facts therein.

That the above violates the equal protection rights of Petitioner and his family is demonstrated by the following cases. In *INS v. Aguirre-Aguirre*, 119 S. Ct. 1449 (1999) the U.S. Supreme Court found that the Board's failure to provide a detailed analysis may not result in reversal where the moving party failed to provide a written brief. Here, it was the INS that was filing the Reply Brief, but the Board issued a two (2) line Decision, without opinion, upholding the Decision of the I.J., said Decision completely ignoring the failure of the INS to properly oppose the Brief of Petitioner. *See De La Llama-Castello v. INS*, 16 F.3d 1093, 1098 (10th Cir. 1994) where the Court of Appeals there noted that the Board *cannot* issue decisions based solely on boilerplate language and where the consideration of the appeal consists entirely of boilerplate the BIA's consideration can be so deficient as to deny due process.

As noted in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) the U.S. Supreme Court there stated that all agency decisions or interpretations that are based upon errors of law are subject to plenary review by the courts. The Court in *Cardoza-Fonseca*, supra, reversed an agency's application of an incorrect standard of proof in an asylum determination. And in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) the U.S. Supreme Court also held that *procedural* errors arising from the violation of *regulations*, statutes, treaties or the *Constitution* were subject to de

novo review and reversal by the Courts. And *see McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 491-94 (1991) where the U.S. Supreme Court held that the Federal Courts have jurisdiction to review the validity of INS or Department of State regulations or Operations Instructions. And *see Zadrydas v. Davis*, 533 U.S. 678 (2001) where the Court stated that the presumption of reviewability has particular force when seeking review of constitutional claims. And *see Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999) and *Mayer v. Reno*, 175 F.3d 1289, 1297 (11th Cir. 1999) where the Courts there found that INA Section 242(g) eliminated review of certain interim, discretionary decisions the INS may take but does *not* apply to non-discretionary issues of statutory interpretation involving review of final orders. And *see Xiao v. Reno*, 963 F. Supp. 874 (N.D. Cal. 1997) where the Court there ruled that the Jurisdiction stripping provision of Section 242(g) only applies to Chapter 12 of Title 8 and does *not* effect action under the due process clause. Also, please reference *Tefel v. Reno*, 972 F. Supp. 608, 612-13 (S.D. Fla. 1997), *reversed on other grounds*, 180 F.3d 1286 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2657 (2000) where it was held that INA Section 242(g) may also be limited to the decisions directly made by the Attorney General and, in any event, could *not* be interpreted to bar review of constitutional claims.

The Eleventh Circuit as well as the BIA have failed to recognize, much less enforce, the uniform agency regulations cited above and consequently those failures are violative of the due process rights of Petitioner and his family, and, further, no showing of prejudice or harmful error is required. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Bridges v. Nixon*, 326 U.S. 135 (1945) and *Montilla*

v. INS, 926 F.2d 162, 169 (2d Cir. 1991). It is well established that a person in removal (formerly deportation) proceedings is *entitled* to *full due process* and that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993).

Pursuant to *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991) the Court there found that the failure to follow the regulations regarding counsel is reversible *per se*. Other cases citing violations of the regulations are: (a) *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001) where the Court found that the agency acted contrary to H-1B regulations; and (b) where the interpretation of the regulation (as by the Eleventh Circuit as noted above) is unreasonable and leads to an unconstitutional result. *See Batanic v. INS*, 12 F.3d 662 (7th Cir. 1993) and (c) in *Gonzalez-Julio v. INS*, 34 F.3d 820 (9th Cir. 1994), where the Court of Appeals there found the ten (10) day BIA filing rule unconstitutional for persons residing in Hawaii. *See also Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002) where the Court of Appeals there found INA Section 236(c) unconstitutional in light of *Zadrydas*' recognition that the issue at stake was the fundamental right to be free from Executive restraint; and, *see Wauchope v. U.S. Dept. of State*, 985 F.2d 1407 (9th Cir. 1993) where the Court of Appeals there struck down the pre-1934 federal statute, Section 1993, that denied the right of a U.S. Citizen mother to confer citizenship at birth to her child as a *violation of equal protection*.

Due process, equal protection, fundamental fairness and proper regulatory and statutory interpretation and construction require a result that gives meaning to the BIA briefing regulations, sanctions and remedies. If

burden of proof is cited against Petitioner then why does the INS (now BCIS) always file (or attempt to file) at least a minimum statement adopting the Decision of the Immigration Judge as their Reply Brief? If no Reply Brief, or consequences, are really necessary and don't matter, why have the regulations in the first place; why have the INS always filing the above response and the BIA taking the actions of Rejecting the INS Reply Brief as in violation of the regulation and citing other regulations for a possible remedy re filing a Motion for a Late Brief?!

In *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 562, 110 S. Ct. 2126 (1990) the Court stated, "Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." And *see INS v. St. Cyr*, 121 S. Ct. 2271, 2290 (2001) where the Court stated that deportation statutes must be narrowly construed in favor of aliens, recognizing the rule of Unity and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."

Issue No. 2

Whether the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's claim for Relief pursuant to INA Section 208(a) re Asylum was against the Substantial Weight of the Evidence and contrary to law in that Petitioner in fact met his statutory and discretionary burdens of proof pursuant to the above and the requirements of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), said Decision being in conflict with *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) re a "reasonable

basis" for his and his family's well-founded fear of future persecution on account of race if forced to return to South Africa.

The Decision of the Immigration Judge (hereinafter I.J.) found both Petitioner and his wife to be *credible* and *consistent* with each other's testimony as well as Petitioner's Form I-589 Asylum application. C.A.R. 081. Further the I.J. found that the Petitioner was consistent in his description of the events that led him to depart South Africa in 1991 as well as having a bona fide subjective fear of returning to South Africa. In contravention to *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the I.J. failed to properly consider the "reasonableness" of Petitioner's fear in light of the Substantial Weight of the evidence, including the voluminous country conditions objective documentary evidence, the long and terrible history of racial persecution in South Africa and the evidence of a Pattern and Practice of persecution on account of race in South Africa by the Black majority against the White minority. The I.J.'s Decision ignores the history of South Africa as well as the objective documentary evidence in contravention of *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); and *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997). The I.J.'s Decision is internally inconsistent, even contradictory, the I.J. not doubting the existence of the threats by Blacks against Petitioner and his family as well as the "growing tensions" Petitioner believed exists between Black and White South Africans, yet finding that the evidence was too attenuated to permit an inference that the threats and racial persecution were in fact motivated by race. C.A.R. 077-084.

Issue No. 3.

Whether the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's Claim for Relief pursuant to INA Section 208(a) re Asylum was against the Substantial Weight of the Evidence and contrary to law in that Petitioner in fact met his statutory and discretionary burdens of proof pursuant to the above and the requirements of 8 C.F.R. Sections 208.13(b)(2)(i) and 208.16(b)(3) as well as being in conflict with *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995) re a Pattern and Practice of Persecution on account of race by the Black Majority against Similarly Situated Whites in South Africa.

The Answers to Issues No. 1 and 2 above are incorporated by reference herein. The Decision of the I.J. was also contrary to the Substantial weight of the evidence and the law by requiring that Petitioner and his family be "targeted" on account of their skin color. The I.J. simply admits Petitioner's case and then omits any legal reference to the claim of Petitioner to a Pattern and Practice of Persecution On Account of Race by the Black majority in South Africa against Similarly Situated White persons. The Decision of the I.J. concludes by ignoring the history of racial persecution and the country condition reports of same that corroborate Petitioner's testimony and establish a Pattern and Practice claim, the Decision of the I.J. being contrary to 8 C.F.R. Sections 208.13(b)(2)(i) and 208.16(b)(3) as well as *Makonnen v. INS*, 44 F.3d 1378, 1382-84 (8th Cir. 1995).

Issue No. 4.

Whether, in the alternative, the Decision of the U.S. Court of Appeals for the Eleventh Circuit in Denying Petitioner's claim for Relief pursuant to INA Section

241(b)(3), re Withholding of Removal, was against the Substantial Weight of the Evidence and contrary to law in that Petitioner met his statutory burden of proof and the requirements of *INS v. Stevic*, 467 U.S. 470 (1984), as well as for the reasons stated in answer to Issues No. 1 and No. 2 above, incorporated by reference, establishing that it is more likely than not that Petitioner and his family will be persecuted on account of their race if forced to return to South Africa.

The Answers to Issues No. 1, 2 and 3 above are incorporated by reference. The I.J. Decision is against the Substantial Weight of the Evidence and the law, improperly relying on conjecture by the I.J. instead of the record as well as improperly relying on statistical evidence. *See* C.A.R. 077 and Petitioner's Opening Brief in response, pages 31-46. The I.J. Decision quotes *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) and then ignores their application and the record. This case cries out for justice – and that the law be properly enforced. The Decision of the I.J. has mischaracterized and distorted the record contrary to the facts and the applicable law and goes further astray by requiring *actual* persecution of Petitioner, C.A.R. 081-082, when such is not required as persecution has never been defined in the asylum context to require actual persecution. *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), where persecution means a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive. The above testimony and objective documentary evidence is credible, consistent, specific, detailed, uncontradicted and compelling and establishes that Petitioner did meet his statutory burden of proof under INA Section 241(b)(3) re Withholding of

Removal in that it is more likely than not that Petitioner and his family would be persecuted on account of their race by the Black majority in South Africa if forced to return.

CONCLUSION

The petition for a writ of certiorari should be granted. Clearly the 11th Circuit Decision herein is in serious conflict with the U.S. Court of Appeals for the Eighth Circuit re *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995) in the application of the Pattern and Practice Similarly Situated bases for a proper claim under INA Section 208(a), the Eleventh Circuit departing from accepted precedent and INS regulations at 8 C.F.R. Sections 208.13(b)(2)(i) and 208.16(b)(3) re a proper and fair evaluation of the record under the Substantial Evidence standard of review. Further, the 11th Circuit Decision is in serious conflict with the U.S. Supreme Court precedent of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) re what constitutes a reasonable fear and what amounts to credible testimony as a basis for proving that fear, consistent with the Substantial Evidence in the record, as well as *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Respectfully submitted,

KENNETH A. FINDLAY, Pro Se
1911 N. 31 Avenue
Hollywood, FL 33021
954-983-8443

TABLE OF APPENDICES

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

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FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 19, 2003
THOMAS K. KAHN
CLERK

No. 02-16330
Non-Argument Calendar

Agency Docket No. A75-348-802

KENNETH A. FINDLAY, Petitioner

versus

U.S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION
SERVICE, Respondents.

Petition for Review of a Final Decision
of the Board of Immigration Appeals

(August 19, 2003)

Before ANDERSON, BLACK and WILSON, Circuit Judges.

PER CURIAM:

Kenneth A. Findlay petitions this Court for review of the final order of the Board of Immigration Appeals (BIA)

affirming the order of the immigration judge (IJ) denying his application for asylum and withholding of removal under the Immigration and Nationality Act.[1] As Findlay's removal proceedings commenced after April 1, 1997, the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 govern his petition for review. *See Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

Findlay and his wife and children are natives and citizens of South Africa. Findlay was admitted into the United States as a nonimmigrant business visitor in July of 1991 with authorization to remain in the United States until January 8, 1992. In November of 1991, his wife and sons also were admitted as nonimmigrant visitors with authorization to remain until January 8, 1992. The Findlays, however, did not leave the United States by that date. Thus, in May of 1997, Findlay filed an application for asylum and withholding of removal with the Immigration and Naturalization Service (INS) based upon accounts that whites in South Africa were being persecuted by blacks. Despite the filing of his application for asylum, however, the INS commenced removal proceedings against the Findlays in July of 1997 for remaining in the United States for longer than permitted.

At an initial hearing, Findlay conceded that he was subject to removal for remaining in the United States illegally. Nevertheless, he requested permission to amend his application for asylum and withholding of removal,

---

[1] Findlay's application names his wife and two sons as derivative applicants.

because blacks in South Africa were targeting whites for persecution on account of their race, and, therefore, he feared for his safety and the safety of his family. In support of his application, Findlay alleged that both he and his wife previously were attacked and mugged by blacks, that their neighbor was attacked by blacks several times, and that blacks threatened to kill his children. He further asserted that he feared a post-apartheid backlash against white South Africans and the government's inability or unwillingness to prevent the crime and violence resulting from such a backlash. After conducting a hearing on the merits, the IJ determined that Findlay failed to present sufficient evidence that he suffered past persecution or that he had a well-founded fear of future persecution, because the evidence did not indicate that white South Africans were being targeted on account of their race. Thus, the IJ concluded that Findlay was not eligible for asylum or withholding of removal. This appeal followed.

We review "[a] factual determination by the BIA that an alien is statutorily ineligible for asylum or withholding under the substantial evidence test." *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1283 (11th Cir. 2001) (internal question marks omitted). Accordingly, we "must affirm the BIA's decision if it is supported by a reasonable, substantial, and probative evidence on the record considered as a whole." *Id.* at 1284 (internal quotation marks omitted). This "test is highly deferential and . . . [w]e must defer to the BIA unless a reasonable factfinder would have to conclude that the requisite fear of persecution existed." Id. (second alteration in original) (citations omitted) (internal quotation marks omitted). As the BIA affirmed the IJ's decision without opinion, however, the IJ's decision became a final agency decision. *See* 8 C.F.R. Section 3.1(e)(4)(ii) (2003).

"Thus, we review the IJ's analysis as if it were the Board's." *Al Najjar*, 257 F.3d at 1284.

Findlay asserts that he is eligible for asylum because he demonstrated a well-founded fear of persecution if he returns to South Africa. Specifically, he contends that the testimonial and documentary evidence presented at his hearing illustrated that there is a pattern or practice of persecution by blacks against whites in South Africa.

An applicant seeking asylum must show that "he . . . has suffered past persecution or . . . has a well-founded fear of future persecution." 8 C.F.R. Section 208.13(b).[2] To demonstrate a "well-founded fear" of persecution, an applicant must "present specific, detailed facts showing a good reason to fear that he . . . will be singled out for persecution on account of his race." *Al Najjar*, 257 F.3d at 1287 (internal quotation marks omitted). An applicant, however, is not required to provide evidence that he will be singled out if he can "establish [] . . . a pattern and practice . . . of persecution," 8 C.F.R. Section 208.13(b)(2)(iii)(A), which "mean[s] something on the order or organized or systematic or pervasive persecution," *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995). In addition to demonstrating a pattern and practice of persecution in South Africa, an applicant must show that he is a member of the group being persecuted "such that his . . .

---

[2] Findlay does not contest the IJ's finding that he failed to demonstrate that he suffered past persecution. Therefore, we focus our analysis solely on the question of whether Findlay established that he had a well-founded fear of persecution. See *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 n. 6 (11th Cir. 1994) (declining to address a district court finding that neither party contested).

fear of persecution upon return is reasonable." *See* 8 C.F.R. Section 208.13(b)(2)(iii)(B).

After thoroughly reviewing the record, we find that substantial evidence supports the IJ's conclusion that Findlay is ineligible for asylum. The documentary evidence submitted by both Findlay and the INS indicates that although South Africa has a high rate of crime and violence, whites have not been the primary victims of targets of criminal activity. In fact, the evidence indicates that black-on-black violence constitutes the majority of the crime in South Africa. We previously noted that "conditions which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." *Al Najjar*, 257 F.3d at 1288 (alteration in original) (internal quotation marks omitted). As the crime in South Africa has not been targeted to any race in particular, Findlay failed to establish that the crime taking place against whites is a form of "organized or systematic . . . persecution." *See Makonnen*, 44 F.3d at 1383. Thus, he failed to demonstrate a well-founded fear of persecution based upon a pattern or practice of persecution of whites in South Africa.

Additionally, Findlay acknowledged that he was not politically active in South Africa. The facts further indicate that his wife and sons returned to South Africa for six weeks without incident, and that his mother and sister continue to live in South Africa and have never been the victims of crime. Thus, there is no reason to believe that he and his family would be the targets of crime or violence

as part of a post-apartheid backlash.[3] Based upon these facts, we do not believe that Findlay's fear that he and his family will be persecuted is reasonable. *See* 8 C.F.R. Section 208.13(b)(2)(iii)(B). We therefore affirm the IJ's order denying asylum.

As we conclude that Findlay failed to meet the standard for asylum, we also find that he failed to establish that he is entitled to withholding of removal. *See Al Najjar*, 257 F.3d at 1292-93 ("Where an applicant is unable to meet the well-founded fear standard for asylum, he is generally precluded from qualifying for either asylum or withholding of deportation" (internal quotation marks omitted).).[4]

Based upon the foregoing, we deny the petition for review.

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[3] The IJ found that "[w]here white South Africans are the victims of crimes, they are generally attacked on account of their political stance or activities."

[4] Findlay alleges that because the INS did not file a brief before the BIA, the BIA accepted his factual allegations as true, or, in the alternative, the INS waived its right to file a reply brief in this Court. Although agency rules permit both parties to file briefs before the BIA, nothing in the rules requires them to do so. *See* 8 C.F.R. Section 3.38(f) (providing that "[b]riefs may be filed by both parties" (emphasis added)). Moreover, neither agency rules not the rules of appellate procedure prohibit a party from filing a brief in federal court if a brief was not filed in the administrative proceedings. *See id.: see also* Fed. R. App. P. 28(c) (permitting the appellee to file a reply brief in response to the appellant's initial brief). Thus, we find that these arguments lack merit.

PETITION DENIED.

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood FL 33021

August 19, 2003

RE: 02-16330-JJ Kenneth A. Findlay v. U.S. Attorney General
AGCY NO.: A75-348-802
CC: Judd Barton James
CC: Jeffrey J. Bernstein
CC: Andrew C. MacLachlan
CC: Richard M Evans
CC: Ernesto H. Molina, Jr.
CC: Administrative File

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 02-16330

Agency Docket No.
A75-348-802-

Stamp: FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Aug. 19, 2003
THOMAS K. KAHN
CLERK

KENNETH A. FINDLAY,
Petitioner,
Versus
U.S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

Petition for Review of a Final Decision of the
Board of Immigration Appeals

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	August 19, 2003
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

Stamp: ISSUED AS MANDATE
OCT 14 2003
U.S. COURT OF APPEALS
ATLANTA, GA

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood FL 33021

October 14, 2003

RE: 02-16330-JJ Kenneth A. Findlay v. U.S. Attorney General
AGCY NO.: A75-348-802
TO:Angela L. Green
CC: Judd Barton James
CC: Jeffrey J. Bernstein
CC: Andrew C. MacLachlan
CC: Richard M Evans
CC: Ernesto H. Molina, Jr.
CC: Administrative File

Envelope:
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
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ATLANTA, GEORGIA 30303

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APPENDIX C

Stamp: 02-16330J

NEW CASE FILING

Court of Appeals for the Eleventh Circuit

STAMP: FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 10 2002
THOMAS K. KAHN
CLERK

Kenneth A. Findlay
Petitioner,
v.
John Ashcroft, Attorney General,
Respondent.

Petition for Review

On Appeal from the Board of Immigration Appeals

Judd B. James, Esq.
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd., Suite C
Hollywood, FL 33021
Tel: 954-894-6700
Fax: 954-893-0927

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kenneth A. Findlay,	)	Petition for Review
Petitioner	)	Agency Case No.
v.	)	A75-348-802,
John Ashcroft,	)	A75-348-803,
Attorney General,	)	A75-348-804,
Respondent		A75-348-805
_____/		

Petition for Review

The Petitioner, Kenneth A. Findlay, hereby petitions this Court for review of the attached final order of the Board of Immigration Appeals entered against him on October 24, 2002. The validity of this order has not been upheld by any court.

Respectfully submitted,

Judd B. James, Esq.
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd., Suite C
Hollywood, FL 33021
Telephone: 954-894-6700
Facsimile: 954-893-0927
By: / signature
Judd B. James, ESQ.

Illinois Bar No. 06181629
Admitted to 11th Circuit
Ct. of Appeals 04-02-2002

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Serial number 04762065633 2002-11-18 33021
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From: Kenneth A. Findlay
1911 North 31st Ave.,
Hollywood, FL 33021
954-983-8443
000008002 04762065633 A75-348-802, et al.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appearance of Counsel Form
TO ENTER AN APPEARANCE, PLEASE COMPLETE AND RETURN THIS FORM WITHIN 14 DAYS. YOU MAY NOT RECEIVE FURTHER NOTICE OF PROCEEDINGS ON APPEAL UNLESS THIS FORM IS TIMELY FILED.

Please Type or Print No. _____

Kenneth A. Findlay, Petitioner vs. John Ashcroft, Attorney General, Respondent

The Clerk will enter my appearance for these named parties: Kenneth A. Findlay

---

appellant	x petitioner	intervenor(s)
In this court	appellee(s)	respondent(s)
these parties are:		amicus curiae

The following related or similar cases are pending on the docket of this court:

None

This appeal is entitled to preference for the following reason(s):

None

Check here if you are court-appointed counsel

Signature: / signature Judd B. James
Social Sec. No.: 345-40-7918
Name (Type or Print): Judd B. James
Firm/Govt. Office : Hollywood Immigration Clinic, Inc.
Phone: 954-894-6700
Street Address: 4437 Hollywood Boulevard, Suite C
City: Hollywood State: FL Zip: 33021

To enter an appearance, you must be an 11th Circuit bar member, seek admission (form below), or be exempt under 11th Cir. R. 46-1(a) (see reverse).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition for Review were served via the U.S. Postal Service, Express Mail, Certified, Return Receipt requested on JOHN ASHCROFT, ATTORNEY GENERAL, Department of Justice, Room B-103, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and Mr. JOHN BULGER, INS DISTRICT DIRECTOR, DIVISION VI, 7880

Biscayne Boulevard, 11th Floor, Miami, Florida 33138 this 18th day of November, 2002.

By: / signature_____
Judd B. James, Esq.

ENVELOPE:

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Clerk
Board of Immigration Appeals
P.O. Box 8530
Falls Church, VA 22041

_____
Official Business
Penalty for Private Use $300

APPENDIX D

U.S. Department of Justice
Civil Division

Seal: DEPARTMENT OF JUSTICE
TWH:DVB:ACM:alg STAMP: COPY
39-18-2885

Washington, D.C. 20530

February 26, 2003

Honorable Thomas K. Kahn, Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303-3147

Re: Kenneth A. Findlay v. INS
Docket No. 02-16330-J (A75 348 802)

Dear Mr. Kahn:

In accordance with Rule 17 of the Federal Rules of Appellate Procedure, enclosed for filing in the above-captioned action is the Certified Administrative Record. A copy of this record has been served upon the petitioner's counsel as indicated in the Certificate of Service attached to the record.

Sincerely,
THOMAS W. HUSSEY
Director
Office of Immigration Litigation

By: / Signature
ANGELA L. GREEN
Legal Assistant
U.S. Department of Justice
Civil Division/Office of
Immigration Litigation
1331 Pennsylvania Avenue, N.W.
Room 700S
Washington, D.C. 20530
(202) 305-4340

Enclosure

cc: Judd B. James, Esquire
Hollywood Blvd., Suite C.
Hollywood, FL 33021

CERTIFICATE OF SERVICE

I hereby certify that the attached Certified Record of Administrative Proceedings has been served upon the petitioner's counsel this **26th** day of **February 2003**, by mailing a copy thereof, first-class postage prepaid, to:

Judd B. James, Esquire
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. Ste C
Hollywood, FL 33021

/ signature
ANGELA L. GREEN
Legal Assistant
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

APPENDIX E

Seal: Department of Justice
Executive Office for
Immigration Review

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Judd James, Esq.
4437 Hollywood Blvd.,
Suite C,
Hollywood, FL 33021

Office of the District
Counsel/MI
155 So. Miami Ave.,
Rm. 500
Miami, FL 33130

Name: FINDLAY, KENNETH A. (R) A75-348-802
Riders: 75-348-803 75-348-804 75-348-805

Date of this notice: 10/24/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

/ signature Jeffrey Fratter
Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A75-348-802 – Miami Date: OCT 24 2002
In re: FINDLAY, KENNETH A. (R)
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: James, Judd, Esq.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. Section 3.1(e)(4).

/ signature (illegible)
FOR THE BOARD

ENVELOPE: U.S. Department of Justice
Executive Office for Immigration Review
Office of the Clerk
Board of Immigration Appeals
P.O. Box 8530
Falls Church, Virginia 22041
Official Business
Penalty for Private Use $300

APPENDIX F

Seal: DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals,
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

James, Judd, Esq.
4437 Hollywood
Blvd., Suite C
Hollywood, FL 33021

Office of the District Counsel/MI
155 So. Miami Ave., Rm. 500
Miami, FL 33130

Name: FINDLAY, KENNETH A. (R)
A75-348-802
Date of this notice: 08/29/2001
Type of Proceeding: Removal
Type of Appeal: Case Appeal
Date of Appeal: 01/09/2001
Appeal filed by: Alien

REJECTION OF BRIEF

Brief does not contain a signature on the proof of service. The INS's brief, which was received at the Board of Immigration Appeals on August 27, 2001 does not include a signature on the proof of service. Accordingly, it is returned to the sender herewith.

PLEASE NOTE

The Board is returning your brief for the reason(s) stated above. If you file your brief late, you must file it along with a motion for consideration of your late-filed brief. There is no fee for such a motion. The motion must set forth in detail, with appropriate support, affidavits, declaration, or

other evidentiary material, emergent reasons and circumstances which prevented the timely filing of the brief. *Only one such motion will be considered by the Board.*

FILING INSTRUCTIONS

Use of an over-night courier service is strongly encouraged to ensure timely filing.

If you have any questions about how to file something at the Board, you should review the Board's *Practice Manual and Questions and Answers* at *www.usdoj.gov/eoir.*

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals – including correspondence, forms, briefs, motion, and other documents. If you are the Respondent or the Applicant, the "Opposing Party" is the District Counsel for the INS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address and the date it was sent to them. *Any submission filed with the* Board without a *75-348-802 certificate of service on the opposing party will be rejected.*

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:

Board of Immigration Appeals,
Clerk's Office,
5201 Leesburg Pike, Suite 1300,
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

To mail by regular first class mail:

Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, VA 22041

APPENDIX G

U.S. Department of Justice
Executive Office for
Immigration Review
Board of Immigration
of Decision of the
Immigration Judge

OMB #1105-0065
Notice of Appeal to
the Board of
Immigration
Appeals

For Official use Only
Stamp: RECEIVED
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2001 JAN -9 A 10:50
BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK

1. List Name(s) and "A" Number(s) of all Applicant(s)/Respondent(s):
FINDLAY, Kenneth A., A#75-348-802
FINDLAY, Marilyn V., A#75-348-803
FINDLAY, Robert J., A#75-348-804
FINDLAY, Richard A., A#75-348-805

! WARNING TO ALL APPLICANT(S)/RESPONDENTS(S): Names and "A" numbers of everyone appealing the order must be written in Item #1.

---

2. Applicant/Respondent is currently __
DETAINED X NOT DETAINED.

3. Appeal for the Immigration Judge's decision dated 12-11-00.

4. State in detail the reason(s) for this appeal. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.

! WARNING: The failure to specify the factual or legal basis for the appeal may lead to summary dismissal without further notice, unless you give specific details in a timely, separate written brief or statement filed with the Board.

1. Immigration Judge (hereinafter IJ) erred in finding that Respondent had not satisfied his burden of proof under I.N.A. Section 208(a), Section 101(a)(42)(A), and *INS v. Cardoza-Fonseca*, 408 U.S. 421 (1987) claiming a well-founded fear of future persecution on account of his race as Respondent's testimony was specific, detailed, consistent and provided a plausible and coherent account of the reasons for his having a well-founded fear of future persecution. See also *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *INS v. Cardoza-Fonseca*, 408 US 421 (1987).

2. IJ abused her discretion misapplying the law by failing to properly weigh and balance the documentary evidence in the record which is more than general country conditions in that it establishes: (1) history of persecution on account of race; (b) white skin as an immutable characteristic which offends the black majority; (c) the racial persecution/discrimination by the government of South Africa and third parties; (d) similarly situated whites subject to a pattern and practice of persecution and discrimination on account of their race; and (e) country-wide persecution and discrimination. (See also *Matter of Mogharrabi*, supra, and *Matter of S-P-*, Interim Decision 3287 (BIA 1996); 8 CFR Sections 208.13(b)(2)(i)(A), (B).

See attached sheet
(Attach more sheets if necessary)
(Form continues on back)
Form EOIR-26
Revised April 1996

5. I __ do X do not desire oral argument before the Board of Immigration Appeals.

6. I X will __ will not file a separate written brief or statement in addition to the "Reason(s) for Appeal" written above or accompanying this form.

! WARNING: Your appeal may be summarily dismissed if you indicate in Item #6 that you will file a separate written brief or statement and, within the time set for filing, you fail to file the brief or statement and do not reasonably explain such failure.

SIGN HERE 7. / Signature: Judd James, Esq.
Signature of Person Appealing Date 1-7-01
(*or attorney or representative*)

8. Mailing address of Applicant(s)/ Respondent(s)
Kenneth A. Findlay
1911 N. 31st Avenue
(Apartment or Room Number)
Hollywood, FL 33021

Mailing address of Attorney or Representative
Judd James, Esq.
4437 Hollywood Blvd.
Suite C
Hollywood, FL 33021

10. CERTIFICATE OF SERVICE
(Must Be Completed)

I, JUDD JAMES, mailed or delivered a copy of this notice of appeal on 1-7-01 to U.S. Immigration & Nat'l. Service, INS Office of Gen. Counsel, Attn: Darrin P. Gayles, at 155 So. Miami Avenue, 5th Floor, Miami, FL 33130.

SIGN HERE: / signature Judd James
Signature of Person Appealing
(*or attorney or representative*)

HAVE YOU?

__ Read all of the General Instructions
__ Provided all of the requested information
__ Completed this form in English
__ Provided a certified English translation for all non-English attachments
__ Signed the form
__ Served a copy of this form and all attachments on the opposing party
__ Completed and signed the Certificate of Service
__ Attached the required fee or fee waiver request

continued from Page 1 (Form EOIR-26, April 1996) Addendum Sheet A

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IMMIGRATION REVIEW
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IMMIGRATION APPEALS
OFFICE OF THE CLERK

Findlay, Kenneth A., A#75-348-802, et al.

3. IJ erred in characterizing Respondent's testimony and documentary evidence as insufficient to meet Respondent's burden of proof re the South African government's ability or willingness to protect white citizens as well as the evidence as to the motive for persecution of the white minority by the black majority, abusing the Court's discretion as a matter of law as to Respondent's claim of a well-founded fear of future persecution. See *INS v. Cardoza-Fonseca*, supra; *Matter of Mogharrabi*, supra, and 9 CFR Sections 208.13(b)(2)(I)(A), (B).

4. IJ erred as a matter of law in applying a "singled out individually" or "specifically targeted" burden of proof to Respondent and his family re establishing past persecution on account of race in that Respondent's subjective testimony, which the IJ found credible, consistent and entitled to "full evidentiary weight," and objective documentary evidence was sufficient to establish that there was a pattern and practice in South Africa of persecution of persons similarly situated to the Respondents on account of race and that Respondents established their own inclusion within the persecuted group of White South Africans. See 8 CFR Sections 208.13(b)(21)(i); 208.16(b)(3); Chen v. U.S. I.N.S., 195 F.3d 198, 203 (4th Cir. 1999) and, further, finding that Respondents had not met their burden of proof in showing that their claim was individualized and that they were a member of a protected group with a sufficient nexus between the persecution of similarly situated Whites and their own experience. See *Kotasz v. INS*, 31 F.3d 847, 853-54 n. 11 (9th Cir. 1994); *Dolores v. INS*, 772 F.2d 223, 226 (6th Cir. 1985); *Perez-Alvarez v. INS*, 857 F.2d 23, 25 (1st Cir. 1988); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

5. IJ erred in finding that Respondents had failed to establish a sufficient link between threats to family members and other testimonial/documentary proof of persecution to establish that they were being "targeted" for persecution on account of their race, mischaracterizing the evidence and failing to properly balance and weigh the evidence as demonstrated by the IJ citing delayed departure and other motives for Asylum which contradicts the IJ's finding of credible, consistent testimony, entitled to "full evidentiary weight" re Respondent as well as clearly being contrary to the manifest weight of the evidence. See

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); *Perez-Alvarez v. INS*, 857 F.2d 23, 25 (1st Cir. 1988); *Mikhael v. INS*, 115 F.3d 299 (5th Cir. 1997); *Matter of Exame*, 18 I&N 303 (BIA 1982); *Akinmade v. INS*, 196 F.3d 951, 958 (9th Cir. 1999); and *Perkovic v. INS*, 33 F.3d 615, 623 n. 7 (6th Cir. 1994).

continued from Page 1 (Form EOIR-26, April 1996) Addendum Sheet B

Stamp: RECEIVED
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EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2001 JAN 9 A 10:50
BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK

Findlay, Kenneth A., A#75-348-802, et al.

6. IJ erred in characterizing Respondent's testimony as limited to statistics, theories, personal experiences and in finding that the evidence established only that crime affects all of South Africa's citizens, is a function of a change in government or "random acts of discrimination," and the documentary evidence in the record, Respondent's testimony and the history of South Africa is sufficient to establish eligibility for relief, when the evidence establishes that a reasonable person would have a well-founded fear of future persecution based on or on account of race. See *Matter of Mogharrabi*, supra; *INS v. Cardoza-Fonseca*, supra, and 8 CFR Sections 208.13(b)(2)(I)(A), (B); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

7. The IJ erred as a matter of law in finding Respondents had not met their burden of proof as to proving a Well

Founded Fear of Future Persecution by applying a standard of proof requiring Respondent to show that he or his family would be "targeted" on account of their skin color and, further, that they must show "specific evidence" to demonstrate that Respondents would suffer persecution, ignoring the alternative standard of showing a pattern or practice of persecution on account of race against Whites in South Africa by Blacks as well as the standard of proof of "well-founded fear" as distinguished from a showing requiring that Respondent actually would suffer persecution on account of race. See *INS v. Cardoza-Fonseca*, 480 US 421 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); 8 CFR Sections 208.13(b)(2)(i); 208.16(b)(3); *Chen v. US INS*, 195 F.3d 198, 203 (4th Cir. 1999); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

8. IJ erred in finding that Respondent had not satisfied his burden of proof under Section 241(b)(3)(A) of the INA as Respondent's testimony was specific, detailed, consistent and provided a plausible and coherent account of the reasons for his clear probability of persecution on account of his race as further supported by the very detailed documentary evidence in the record re: (a) history of persecution on account of race; (b) white skin as an immutable characteristic which offends the black majority; (c) the racial persecution/discrimination by the government of South Africa and third parties; (d) similarly situated whites subject to a pattern and practice of persecution and discrimination on account of their race; and (e) country-wide persecution and discrimination. See *INS v. Stevic*, 467 US 407 (1984); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

EXPRESS MAIL *ET040052774US
UNITED STATES POSTAL SERVICE POST OFFICE TO ADDRESSEE
ORIGIN DELIVERY (POSTAL USE ONLY)
(illegible)

FROM: (please print)
Phone (954) 894-6700
Hollywood Immigration Clinic, Inc.
Atty. Judd James
4437 Hollywood Blvd.,
Hollywood, FL 33021

TO: (please print)
Phone
Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, VA 22041
ZIP+4

FOR PICKUP OR TRACKING CALL 1-800-222-1811
www.usps.com EMS

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE BEFORE THE BOARD OF IMMIGRATION APPEALS EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

In the Matter:
FINDLAY, Kenneth A
A 75-348-802, et al.

DATE: 1-7-01

I hereby enter my appearance as attorney (*or representative*) for and at the request of the following named person(s)

ALIEN NUMBER (*list lead alien number and all family member alien numbers if applicable*)
A 75 – 348 – 802
A 75 – 348 – 803
A 75 – 348 – 804
A 75 – 348 – 805

NAME Kenneth A. Findlay
ADDRESS 1911 N. 31st Avenue, Hollywood, FL 33021

Check if Applicable Item(s) below:

X 1. I am an attorney in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia:

Illinois, Supreme Court of Illinois, No. 06181629 and am not under a court or administrative agency order suspending, enjoining, disbarring, or otherwise restricting me in practicing law.

__ 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:

__ 3. I am associated with _____, the attorney of record who previously filed a notice of appearance in this case and my appearance is at his/her request. *(If you check this item, also check item 1 or 2 whichever is appropriate.)*

Stamp: RECEIVED
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2001 JAN-9 A 10:50
BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK

__ 4. Other (*Explain fully.*)

SIGNATURE	COMPLETE ADDRESS
/ signature Judd James, Esq.	Hollywood Immigration Clinic, Inc. 4437 Hollywood Blvd., Suite C, Hollywood, FL 33021

NAME (*Type or print*)	TELEPHONE NUMBER
Judd James, Esq. ATY 454 or 8880	954-894-6700

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO REPRESENTATION BY AND THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY EOIR SYSTEM OF RECORDS:

Judd James

(*Name of Attorney or Representative*)

NAME OF PERSON CONSENTING	SIGNATURE OF PERSON CONSENTING	DATE
Kenneth A. Findlay	/ signature KA Findlay	1-7-01

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is or claims to be a citizen of the United States or an alien lawfully admitted for permanent residence.)

FORM EOIR-27
JAN. 89

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

JUDD JAMES, ESQ.
4437 HOLLYWOOD BLVD.,
HOLLYWOOD FL 33021

IN THE MATTER OF FINDLAY, KENNETH A. (R) et al	FILE A 75-348-802, 803, 804 & 805	DATE: Dec. 13, 2000

__ UNABLE TO FORWARD – NO ADDRESS PROVIDED.

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITH 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:BOARD OF IMMIGRATION APPEALS

OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION

1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
155 SOUTH MIAMI AVENUE., ROOM 800
MIAMI, FL 33130

X OTHER: *Order*

/ signature
COURT CLERK
IMMIGRATION COURT

CC: INS, ADC FF
SG1

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF: FINDLAY, Kenneth A., A#75-348-802, FINDLAY, Marilyn V., A#75-348-803, FINDLAY, Robert J., A#75-348-804, FINDLAY, Richard A., A#75-348-805, RESPONDENTS	)	In Removal Proceedings

CHARGE:	Section 237(a)(1)(B) of the Immigration and Nationality Act: Present in Violation of Law
APPLICATIONS:	Section 208(b) of the Immigration and Nationality Act: Asylum Section 241(b)(3) of the Immigration and Nationality Act: Withholding of Removal

ON BEHALF OF APPLICANT	ON BEHALF OF SERVICE
Judd James, Esquire Hollywood Immigration Clinic, Inc., 4000 Hollywood Blvd., Suite 350N Hollywood, Florida 33201	Darrin P. Gayles, Asst. District Counsel Immigration and Naturalization Service 155 South Miami Ave., 5th floor Miami, Florida 33130

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondents in the present case are natives and citizens of South Africa. On July 9, 1991, lead Respondent (Respondent) was admitted into the United States at Atlanta, Georgia, as a nonimmigrant business visitor, with authorization to remain in the United States until January 8, 1992. The other respondents, Respondent's wife and two sons, arrived in the United States at New York, New York on November 30, 1991, as nonimmigrant visitors, also with authorization to remain in the United States until January 8, 1992. Respondents subsequently overstayed their visas. Respondent filed an affirmative application for asylum, consolidating all of the family members' claims together, with the Immigration and Naturalization Service (Service) on May 5, 1997.[1] On July 31, 1997, the Service initiated removal proceedings against Respondents by issuance of a Notice to Appear (NTA), alleging the above mentioned facts and charging Respondents with removability pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act (Act).

At a master calendar hearing on August 19, 1997, Respondent, through counsel, conceded proper service of the NTA, admitted the factual allegations contained therein, and conceded removability as charged. South Africa was designated as Respondent's country of removal. Based on these admissions and concessions, the Court

[1] The application was subsequently filed with the Court on August 13, 1997.

finds that removability has been established by clear and convincing evidence. *See* INA Section 240(c)(3); *see also* 8 C.F.R. Section 240.8(a). At the August hearing, Respondent then requested an opportunity to supplement his initial application for asylum and withholding of removal. On January 15, 1998, the Court conducted a merits hearing to determine whether Respondents merited the forms of relief that they requested.

II. STATEMENT OF FACTS.

A. Respondent's Testimony

At an individual merits hearing on January 15, 1998, Respondent testified to the following facts:

Born on June 27, 1948 in Johannesburg, South Africa, Respondent last arrived in the United States on July 9, 1991. Prior to that arrival, Respondent visited the United States in 1977 for vacation and on numerous other occasions for the purpose of conducting business. Respondent was a gunsmith in South Africa and often worked on creating new gun designs. In 1989 Respondent closed his South African gun business, because the South African economy was doing poorly and the African National Congress (ANC) announced they intended to ban the distribution of firearms to South African residents. By closing his business, Respondent earned some amount of capital, and as such, decided to make some trips to the United States in an attempt to establish business ties there. On his visits to the United States, Respondent hoped to find a gun manufacturer willing to implement the design of some of his guns. He did ultimately find a manufacturer who was interested in his gun design in 1991, but the company was unable to obtain proper work documents

for Respondent, and Respondent therefore returned to South Africa, albeit temporarily.[2]

Throughout the 1970s and 1980s, Respondent lived in South Africa. In his testimony, he described a situation in which South Africa gradually deteriorated into a nation of instability and violence over the course of those decades. According to Respondent, the once highly motivated and highly organized police force and military fell into disarray as both became torn apart by racial strife.

Respondent stated that the police force slowly became a criminal force, and that the government was in no position to protect its citizens from what Respondent termed "rampant violence." Respondent explained that, over time, blacks became more aggressive and militant and that the ANC began using whatever means it could to destabilize South Africa, including bringing young children into the fight for liberation.

When asked about what made him personally afraid, Respondent indicated three different occurrences that led him to believe that he and his family were in danger: (1) a mugging in 1990; (2) uncontrolled rioting in a town neighboring his hometown; and (3) threats to his children's lives. With regard to the mugging, about nine months before Respondent left for the United States, Respondent was attacked by five black men while walking in broad daylight in downtown Johannesburg.[3] He had just parked

---

[2] Respondent did not give a detailed account of this time period, and as such, the Court lacks specific dates for some of these events.

[3] Respondent specified that it was around 1 p.m. at the time of this mugging.

his Porsche and was walking into his place of business (a gun boutique), when one of the men pulled out a knife and struck him in the chest. At the time, Respondent was carrying a gun in his briefcase and struggled to retrieve the gun as the muggers beat and kicked him. The muggers succeeded in stealing Respondent's wallet and Rolex watch, but he was ultimately able to retrieve his gun. Apparently, the sight of the gun frightened Respondent's muggers, and they scattered into a nearby crowd. None of the five men said anything to Respondent while they mugged him, nor did the large group of black people that Respondent asserts were in the surrounding area when the attack occurred. According to Respondent, he saw no point in filing a police report, because he did not think the police would do anything about the incident.

Of further concern to Respondent was an incident one evening that involved rioting by black South Africans in a nearby township. On that evening, a police officer came to his house and stated that there was uncontrollable rioting in a neighboring township. The police officer consequently told Respondent to arm himself, to make sure his family remained inside the house and to shoot any of the rioters should they enter onto his property. What the police officer seemed to be saying, from Respondent's perspective, was that the police were unable to control the riots, and therefore, Respondent would have to take matters into his own hands, if he wished to protect his family.[4]

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[4] Although Respondent and his family remained safe that evening, Respondent subsequently purchased a home about forty miles outside of Johannesburg, in hopes of getting away from "all the trouble."

As to the threats to Respondent's children, Respondent explained that this marked the final factor in convincing him that his family needed to leave South Africa. While still living in South Africa, Respondent employed several black people in his home, including a woman who worked as his family's maid. About six months prior to Respondent's departure from South Africa, the maid told Respondent that the ANC told her that, as soon as the ANC rose to power, her job was to kill Respondent's children. Although Respondent did not believe the maid herself was capable of such acts of violence, the mere threat of the ANC killing his children was enough to make Respondent want to leave South Africa.[5] That said, Respondent conceded that there were no acts of violence against his children prior to their departure from South Africa.

As a result of these events, Respondent finally decided to leave South Africa permanently in 1991. Looking back, Respondent feels that by living in South Africa, he was denied the fundamental right of being able to feel secure in his own home.[6] He further explained that he was forced to carry a gun at all times for protection and that his family was stopped at least once a week by the police force for vehicle inspections. Having depicted these seemingly dangerous conditions, Respondent did concede that he

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[5] Respondent also spoke more generally about violence against children in South Africa, including the blowup of a school bus filled with children.

[6] He noted that his neighbor was killed by a black man, while parked just outside his home. This murder allegedly occurred after Respondent and his family arrived in the United States.

himself never had anything stolen from his home and never had to protect his home with a fence. He also stated that he and his wife were never raped or imprisoned, and save for the mugging, experienced no other violent incidents. In addition, Respondent admitted that his mother and sister still reside in South Africa, and neither have suffered any physical harm at the hands of black South Africans. Finally, Respondent noted that neither he nor his wife or children were politically active in South Africa.

As he described it, Respondent has at no time since his departure in 1991 felt safe to return to South Africa. For a long time, he awaited positive changes in the political, social and economic conditions of South Africa, stating that he would have returned had conditions shown at least some sign of improvement. Those changes did not come. Rather, the situation has only worsened, according to Respondent. He believes that returning his family to South Africa would mean subjecting them to serious danger, as he does not think any white person can be safe in South Africa. He attests that significant numbers of black people are persecuting white people, and does not want his family to become "a victim of the post-apartheid backlash."

B. Wife's Testimony

Respondent's wife, Marilyn Findlay (Wife), testified to the following facts at the hearing conducted on January 15, 1998:

Wife was born on November 14, 1955 in South Africa. During high school, she and Respondent met, and they now have two children together, ages sixteen and thirteen. Like Respondent, Wife firmly believes that the situation in

South Africa is extremely dangerous for white people, and she is afraid of what might happen should she and her family return there. Moreover, she feels that the rising level of violence is not a result of simple crime. Rather, she is certain that the majority of the violence stems from widespread racial hatred, noting the murder of American Amy Biehl in 1994 as one example of such hatred.[7]

When asked to explain the root of her fear, Wife referred to widespread animosity toward whites in South Africa, and claimed that the police were incapable of stemming this animosity as there are significant racial divisions amongst the police officers themselves. Wife also noted several reports from the Internet which indicated to her that the situation in South Africa was only worsening: stories of fights between black and white students, accounts of a brutal attack by black men against an elderly white couple, and reports of the rape of a white man by several black men.

In addition to the increasingly widespread violence, Wife noted that the political situation for white South Africans is deteriorating as well. She pointed to several government officials, namely Deputy Minister Peter McCarber and Minister of Justice Dela Omar, as people now in power who openly reveal their animosity towards white. Wife also asserted that white people lack any representation in the government, but later admitted on

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[7] Amy Biehl was an American Fulbright Scholar who was stoned to death in South Africa in 1993, where she had gone to help set up a legal education center. Four black South Africans were eventually convicted for her murder. World News Library, at http://worldnews/about.com/newsissues/worldnews/library/weekly/aa073098.htm

cross-examination that white South Africans do in fact still have the right to vote. Finally, Wife noted the impact of affirmative action policies in South Africa on the ability of white people to obtain jobs. She stated that whites are routinely kicked out of their jobs to make room for black South Africans, despite the fact that, according to Wife, the black majority should not need affirmative action.

In reference to her own personal experience, though, Wife conceded that she herself has not been the victim of any violence. In fact, after her initial arrival in the United States in October 1990, Wife returned to South Africa with her children as her father was very ill. Wife and her children spent nearly six weeks in South Africa on that visit, and were "not punished or threatened in any way based on race." That said, Wife is still convinced that she and her family would ultimately become targets of racial violence if they were forced to return to South Africa. To bolster this assertion, Wife noted the fact that there are nearly thirty million blacks in South Africa as compared to only four to five million whites. Wife believes it is simply inevitable that the black people, having been denied so much for such a long time, will seek revenge against white people. She also feels that "white faces are an easy target for hate," and as such, white people cannot be safe in South Africa.

C. General Country Conditions in South Africa

General background information about a country, where applicable, must be included in the record as a foundation for an applicant's claim of asylum and withholding of removal. *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). Where the record contains information

regarding general country conditions and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating evidence is not required. *Id.* The record at hand contains the Department of State's South Africa Country Report for 1997 and Advisory Opinion, the UNHCR REFWORLD Country Information on South Africa for 1997, the Amnesty International Report on South Africa for 1995, and numerous other articles and internet news releases pertaining to the situation in South Africa.

Although the burden of proof is not on the Court, if background evidence is central to an applicant's claim and the Court relies on additional evidence of country conditions, the Court must make the source of such supplementary information part of the record. *Matter of S-M-J-*, *supra* at 727. In addition to the parties' substantial submissions on country conditions, the Court also reviewed the Department of State's Country Reports on Human Rights Practices for 1998 and 1999[8], a Human Rights Watch Report on Human Rights Developments in South Africa for 1999, and Amnesty International's Annual Report 2000 for South Africa.

In 1994, the ANC won South Africa's first all-race elections and has subsequently been working toward bringing democracy to the country. In May 1999, South Africa held its second all-race elections, and as predicted, the ANC won once again with a large majority of the votes. With rising public anger and international concern over high rates of violent crime, the present government, upon

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[8] U.S. State Department Country Report – South Africa, at

assuming power, deemed protection of its citizens as a major national priority. In furtherance of this goal, the government established a new national priority crime investigation unit and introduced legislation to tighten controls over gun ownership.

Even with these efforts, South Africa remains plagued by ever-increasing levels of violent crime. There are numerous reports of politically motivated violence, and vigilante action and mob justice remain prevalent throughout the country. Despite increasing violence in areas that previously experienced little or no crime, namely affluent white suburbs, statistical evidence indicates that black South Africans are still the principal victims of violent crime and that the highest crime rates continue to be in historically black townships where most urban blacks still live.

D. Service's Position

The Service argues that Respondent should be denied asylum and withholding of removal, because he has not adequately shown a well-founded fear of persecution based on his race. Specifically, the Service does not find merit in Respondent's assertion that the mugging in 1991, the uncontrolled rioting in a neighboring township, and the alleged threats to his children's lives indicate persecution on account of his race. Moreover, the Service contends that Respondent is incorrect in believing that black South Africans will necessarily pursue a campaign of revenge against white South Africans, simply because they have been denied fundamental rights in the past. In fact, the Service notes that there is every indication within the South African government and its constitution that

significant efforts are being made to stem racial tensions. In addition, the Service asserts that Respondent's concerns about widespread violence in South Africa do not qualify as one of the grounds for persecution sufficient to merit asylum relief. Finally, insofar as Respondent failed to meet the lower burden required for an asylum claim, he cannot possibly meet this higher burden for relief in the form of withholding of removal.

E. Documentary Evidence Considered

Exhibit 1 **Notices to Appear**
1A (Kenneth Findlay)
1B (Marilyn Findlay)
1C (Robert Findlay)
1D (Richard Findlay)

Exhibit 2 **Application for Asylum and Withholding of Deportation**, Form I-589, dated May 5, 1997 (Tabs 1 through 70)

Exhibit 3 **South Africa Country Report on Human Rights Practices for 1997 & Advisory Opinion**, United States Department of State

Exhibit 4 **UNHCR REFWORLD Country Information on South Africa for 1997**

Exhibit 5 **Supplement to Application for Asylum and Withholding of Deportation** (Tabs A through H)

Exhibit 6 **Respondent's Composite**: Series of articles from the Data Center Information Services (Tabs 1 through 24)

III. ASYLUM ANALYSIS

Under section 208(b) of the Act, the Attorney General, through an Immigration Judge, may grant asylum as a matter of discretion to an individual who is a refugee

within the meaning of the Act. To establish eligibility for asylum or withholding of removal, an applicant must credibly demonstrate that he suffered past persecution, has a well-founded fear of future persecution, or has established a clear probability of persecution within the meaning of the Act. *Matter of E-P-*, 21 I&N Dec. 860 (BIA 1997). In addition, the applicant must demonstrate that the alleged persecution is "on account of race, religion, nationality, membership in a particular social group, or political opinion. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The applicant's fear of persecution must also be country-wide. *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988); *Matter of Acosta*, 19 I&N Dec. 211, 235 (BIA 1985). Finally, the applicant must demonstrate that he is eligible for asylum as a matter of discretion. *See* INA section 208(b)(1); *see also Cardoza-Fonseca*, *supra* at 423.

A. Credibility

Before determining whether an applicant is statutorily eligible for asylum or withholding of removal, the Court must make a threshold determination of the alien's credibility. A claim of persecution that lacks credibility cannot satisfy the burdens of proof and persuasion necessary to establish eligibility for asylum and withholding of removal. *See generally*, *Matter of Mogharrabi*; 8 C.F.R. Sections 208.13(a) and 208.16(b). Indications of credible testimony are consistency on direct and cross examination, consistency with the written application, and the absence of embellishment as the applicant repeatedly tells his story. *Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995). The Court may make an adverse credibility finding against an asylum applicant when: (1) discrepancies and omissions

exist; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the applicant offers no convincing explanation for the discrepancies and omissions. *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).

Even uncorroborated testimony by applicants may be sufficient to sustain the burden of proof, so long as such testimony is credible, persuasive and specific. 8 C.F.R. Section 208.13(a); *Matter of Mogharrabi*, *supra* at 444. However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided. *Id.*; *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998). If such evidence is unavailable, the applicant must explain its unavailability, and the explanation must be included in the record. *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

In the present matter, the Court has carefully reviewed the documentary evidence presented and listened to Respondent's testimony while observing his demeanor. Respondent's testimony and documentary submissions describe his experience while living in South Africa, and the growing tensions he believes exist between black and white South Africans. In both his applications and testimony, Respondent was consistent in his description of the events that led him to depart South Africa in 1991 and the fear he presently feels at the thought of returning to South Africa. *See* Exhibit 2. Moreover, the Court finds that Respondent's testimony was also consistent with that of his wife's. The Court therefore finds that Respondent presented a credible account of his experience in South Africa and will consequently lend both Respondent and Wife's testimonies their full evidentiary weight. However, the Court recognizes that a finding of credibility is not

dispositive as to whether asylum should be granted. See *Matter of E-P-. supra* at 3 (stating that a finding of credible testimony is not necessarily conclusive, and therefore, that the specific content of the testimony and any other relevant in the record must also be considered).

B. Persecution

In order to establish eligibility for asylum, Respondent must demonstrate past persecution or a well-founded fear of persecution. INA Section 101(a)(42)(A); 8 C.F.R. Section 208.13(b). While the word "persecution" is nowhere defined in international treaties or domestic statutes, *Balazoski v. INS*, 932 F.2d 638, 641-42 (7th Cir. 1991); Handbook[9], para. 51, the term has developed meaning through case law. "Persecution" contemplates harm or suffering inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. *Matter of Acosta, supra* at 223. Some courts have found that persecution includes the actual infliction of physical harm, confinement, torture, and severe economic deprivation constituting a threat to an individual's life or freedom. *INS v. Stevic*, 467 U.S. 407, 428 (1984); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969);

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[9] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) (hereinafter "Handbook"). While the Handbook does not presume to have the force of law in the United States, *see* Handbook, para. 1(ii), it nonetheless "provides significant guidance in construing the Protocol [relating to the Status of Refugees], to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, at 439, n.22.

Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1962). Once established, persecution will provide a basis for asylum if it is inflicted at the hands of either the government, or a group which the government is unable or unwilling to control. *McMullen v. INS*, F.2d 1312, 1315 N.2 (9th Cir. 1981).

1. Past Persecution on Account of Race

In order to establish past persecution, Respondent must present some evidence that the alleged persecutors wanted to punish him and his family on account of one of the five grounds enumerated in the Act. *See* INA Section 208(b)(2); INS v. Elias-Zacarias, 502 U.S. 478 (1992). A series of incidents, in the aggregate, can "rise to the level of persecution as contemplated by the Act." *Matter of O-Z & I-Z-*, Int. Dec. 3346, at 4 (BIA 1998); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) ("the cumulative effect of several incidents may constitute persecution.". Moreover, a finding of past persecution creates a rebuttable presumption that the asylum applicant has a well-founded fear of future persecution. 8 C.F.R. Section 208.13(b)(1)(i); *see also Matter of C-Y-Z-*, 21 I&N Dec. 915, 919 (BIA 1997); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996).

In the present case, the Court finds that there is insufficient evidence to demonstrate that Respondent suffered past persecution on account of his race. Respondent based his allegations of past persecution on his mugging in downtown Johannesburg, a single incident of uncontrollable rioting in a nearby township and threats to his children's lives. First, while the Court recognizes that the mugging involved five black assailants, this fact alone does not support the inference that the mugging was an

act of persecution on account of Respondent's race.[10] Rather, the Court believes it more likely that Respondent was attacked because of his economic status. It bears mentioning that Respondent had just stepped out of an expensive car and was wearing expensive jewelry, moments prior to the mugging. While the Court recognizes that, Respondent's economic status aside, there may have been a number of reasons for the mugging, Respondent failed to demonstrate that one motivation was to persecute him on account of his race. *See Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) ("evidence that indicates that the perpetrators were motivated by the victim's wealth, in the absence of evidence to suggest other motivations, will not support a finding of persecution within the meaning of the Act").

Second, with regard to the uncontrolled rioting in a township near Respondent's home, the Court finds that there is insufficient evidence to demonstrate that Respondent or his family were specifically targeted that night on account of their race. To be sure, the riots were comprised of almost exclusively black participants, but this fact alone is inadequate proof of past persecution. The fact that Respondent and his family neither advocated anti-apartheid sentiments nor participated in South African political activities leads the Court to believe that the rioters had no reason at all to target Respondent or his family. Without more evidence, the Court simply cannot

[10] The Court also notes that none of the assailants stated any racial epithets at Respondent that would give rise to the belief that this mugging was executed on account of Respondent's race.

infer that these riots constituted an act of persecution on account of Respondent's race.[11]

Finally, as to the threats against Respondent's children, the Court sympathizes with Respondent's situation. However, the threats do not rise to the level of past persecution. The Court does not doubt the existence of these threats, but the links between the AND threats and Respondent's children are simply too attenuated to permit an inference by the Court that Respondent's children were being targeted on account of their race. Moreover, the children remained unharmed for nearly a year after these threats were delivered, at which time they moved to the United States.

On a final note, the Court draws attention to two additional factors. First, Respondent remained in South Africa for nearly nine months after these incidents occurred and his family remained in South Africa for more than a year. Although the Court will not speculate as to why they did not leave sooner, the Court does find that these delayed departures cast at least some doubt on the gravity of Respondent's situation in South Africa. Second, Respondent made several business trips to the United States while still living in South Africa. He admitted having made these trips in hopes of establishing business connections in the United States, as his business in South Africa had failed. The Court finds that this casts some doubts on Respondent's motivation for seeking asylum in the United States. See *Matter of Acosta-*, 19 I&N 211 (BIA

[11] The Court notes that, based on the evidence in the record, it is not even clear whether these riots were racially motivated.

1985) (finding that the primary motivation for requesting refuge in the United States must be fear; no other motivation, such as a desire to experience greater economic advantage in the United States will suffice for the purposes of an asylum claim). Considering Respondent's questionable motivations, in light of the details of the above-mentioned events, the Court finds that there is insufficient evidence to support a finding of past persecution on account of race. *See Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

2. Well founded fear of future persecution

Because Respondent did not establish past persecution, he bears the burden of proving that he has a well-founded fear of future persecution. Although a well-founded fear of persecution is not statutorily defined, courts have indicated that an applicant for asylum may establish a well-founded fear by showing that a reasonable person in his circumstances would fear persecution on account of one of the five grounds specified in the Act. *Matter of Mogharrabi*, *supra* at 440-41; *see also Cardoza-Fonseca*, *supra* at 440. To meet the requirements of the well-founded fear standard, an applicant must present credible, direct, and specific evidence that his or her fear is "subjectively genuine and objectively reasonable." *Aguilera-Cotas v. INS*, 914 F.2d 1375, 1378 (9th Cir. 1990); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987). The subjective element requires a showing by the applicant of a genuine apprehension or awareness of the risk of persecution. *Matter of Acosta*, *supra* at 221. To satisfy the objective component, Respondent's fear of persecution must be reasonable based on evidence in the record. *DeValle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990).

In the present case, the Court finds that Respondent failed to establish a well-founded fear of persecution on account of his race. The Court recognizes that Respondent genuinely fears being persecuted on account of his race, but finds that such fear is not "objectively reasonable" in light of the present situation in South Africa. Respondent has offered a plethora of news articles and Internet sites to support his assertion that white South Africans are being persecuted by black South Africans. *See* Exhibit 6. However, upon thorough examination of the record, the Court finds that the evidence simply does not indicate that white South Africans are being targeted on account of their skin color. *See* Exhibit 3; *see generally Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994) (introducing evidence of a random possibility of persecution is insufficient to establish a well-founded fear of persecution); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) (finding that a respondent must show specific evidence to demonstrate that he would suffer persecution).

Of further significance, Respondent's wife and children returned to South Africa shortly after their arrival in the United States. Despite their assertions that South Africa was entirely unsafe for whites at that time (and remains so to the present day), Respondent's wife and children spent nearly six weeks there. They experienced "no problems on account of their race" during their visit. In addition, Respondent's mother and sister still reside in South Africa, and neither have suffered any harm at the hands of black South Africans. The family visit to South Africa and the Respondent's family remaining there both serve to undermine the reasonableness of Respondent's fear. *See Matter of A-E-M-*, 21 I&N Dec. 1157, 1160 (BIA 1998) (the reasonableness of an alien's fear is reduced

when his family remains in his native country for a long period after his departure).

In his testimony, Respondent offered two main reasons why he fears returning to South Africa, namely his fear of post-apartheid backlash against white South Africans and the present government's inability to curb such a backlash. The Court finds that neither are sufficient to establish a well-founded fear. As to the post-apartheid backlash, despite the wealth of statistics in the record indicating increasing violence in South Africa, there is almost no indication that said violence is primarily inflicted on white South Africans by black South Africans. Rather, all of the descriptions in the articles and reports must be viewed alternatively as functions of the change in government which occurred in 1994, isolated instances of crime, or random acts of discrimination.

Contrary to Respondent's position, crime affects *all* of South Africa's citizens, white and black. *See Matter of E-P-*, *supra* at 863 n. 3; *see also Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985) (finding that generally harsh conditions which affect the populace as a whole are insufficient to establish a basis for asylum). In fact statistical evidence indicates that black South Africans are still the principal victims of violent crime and that the highest crime rates continue to be in the black townships. *See* Exhibit 3. Where white South Africans are the victims of crimes, they are generally attacked on account of their political stance or activities, as was the situation in the murder of Amy Biehl. *See* Exhibit 2 at Tab 7. Respondent and his wife both testified that they were not politically active in South Africa, and therefore, the Court finds that there is no reason to believe that they would be targeted.

As to Respondent's assertion that the South African government is unable to protect white South Africans, there is no indication of an inability or unwillingness on the part of the black ruling government either to prosecute black defendants or to protect white citizens. On the contrary, the government has undertaken to solve the often formidable problems brought about by life under apartheid, while maintaining its commitment to protecting all of its citizens. *See* Exhibit 3. Wife's assertion that the affirmative action policies of the present government offers some evidence of persecution against white South Africans is unfounded. According to the UNHCR RefWorld Report, affirmative action policies were implemented to ensure that benefits were distributed more equally to *all* racial and ethnic groups, not to mention the fact that the policies have had little impact as of yet. *See* Exhibit 4.

Of course, the Court is cognizant that the situation in South Africa is far from perfect and does not discount the genuine fear felt by Respondent and his family. The record certainly speaks to the fact that South Africans are presently struggling with an ever-increasing level of crime and volatile economy. Nevertheless, the Court views the present problems in South Africa as those regrettably associated with so many countries in the midst of political, economic and social transition. The Court therefore finds that Respondent has failed to meet the burden of proving he or his family have a well-founded fear of future persecution.

IV. WITHHOLDING OF REMOVAL UNDER SECTION 241(b)(3) OF THE ACT

Inasmuch as Respondent has failed to satisfy the lower burden of proof required for asylum under section 208(b) of the Act, it also follows that he has also failed to satisfy the higher standard of eligibility required for withholding of removal under section 241(b)(3)(A) of the Act. *See INS v. Cardoza-Fonseca, supra.*; *see also Matter of Mogharrabi, supra*; 8 C.F.R. Section 208.16(c)(2).

ORDERS

IT IS HEREBY *ORDERED* that Kenneth Findlay's (Lead Respondent) application for asylum, pursuant to section 308(b) and withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, shall be ***DENIED***.

IT IS HEREBY FURTHER *ORDERED* that Marilyn Findlay's (Wife Respondent) application for asylum, pursuant to section 308(b) and withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, shall be ***DENIED***.

IT IS HEREBY FURTHER *ORDERED* that Robert Findlay's application for asylum, pursuant to section 308(b) and withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, shall be ***DENIED***.

IT IS HEREBY FURTHER *ORDERED* that Richard Findlay's application for asylum, pursuant to section 308(b) and withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, shall be ***DENIED***.

IT IS HEREBY FURTHER *ORDERED* that Respondents be ***REMOVED*** to Africa, the designated country of removal.

Dated this 11 day of December, 2000.

/ signature
Honorable Lilliana Torreh-Bayouth
UNITED STATES IMMIGRATION JUDGE

LTB/hrp

APPENDIX I

U.S. Department of Justice
Immigration and Naturalization Service Notice to Appear
In removal proceedings under section 240 of the
Immigration and Nationality Act

File No. 75 348 802

In Matter of:
Respondent: FINDLAY, KENNETH A currently
residing at: 1911 N 31 AVE HOLLYWOOD, FL 33021-
0000 954-983-8443

[ ] 1. You are an arriving alien.

[ ] 2. You are an alien present in the United States who has not been admitted or paroled.

[X] 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1) You are not a citizen or national of the United States;

2) You are a native of SOUTH AFRICA and a citizen of SOUTH AFRICA;

3) You were admitted to the United States at ATLANTA, GA on or about July 9, 1991 as a nonimmigrant visitor for business with authorization to remain in the United States for a temporary period not to exceed January 8, 1992;

4) You remained in the United Sates beyond January 8, 1992 without authorization from the Immigration and Naturalization Service.

Stamp: RECEIVED
DEPARTMENT OF JUSTICE
97 AUG 13 PM 1:09
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
(illegible)

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a non-immigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted.

[ ] This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

[ ] Section 235(b)(1) order was vacated pursuant to:

[ ] 8 CFR 208.30(f)(2) [ ] 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: 155 SOUTH MIAMI AVE., ROOM 800, MIAMI, FL 33130-0000
on 8-19-97 at 10:30 AM to show why you should not be removed from the United States based on the charge(s) set forth above.

/ signature Kathie M (illegible) SAC

Date: JUL 31 1997 MIAMI, FL

See reverse for important information

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear is served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence

and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

_____

(Signature of Respondent)

Before:

_____ Date: _____
(Signature and Title if INS Officer)

Certificate of Service

This Notice to Appear was served on the respondent by me on AUG 12 1997, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

[X] in person [ ] by certified mail, return receipt requested [ ] by regular mail

[X] Attached is a list of organizations and attorneys which provide free legal services.

[ ] The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

/ signature Kenneth Findlay / signature Susan Baron
(Signature of Respondent if Personally Served) CR (Signature and Title of Officer)